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No. 71-1216

In the Supreme Court of the United States

OCTOBER TERM, 1971

BIG "D" DEVELOPMENT CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum findings of fact and opinion (Pet. App. B-1 to B-15) and the memorandum sur order (Pet. App. B-17 to B-20) of the Tax Court are not officially reported. The *per curiam* affirmance of the Court of Appeals for the Fifth Circuit without opinion (Pet. App. B-21) is reported at 453 F. 2d 1365.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1972 (Pet. App. B-22). A petition for rehearing was denied on February 10, 1972 (Pet App. B-23). The petition for a writ of certiorari was filed

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on March 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in affirming, on the parties' briefs and the record but without oral argument, the decision of the Tax Court that petitioner might not report on the installment method, under Section 453(b) of the Internal Revenue Code of 1954, gain on the sale of real property to an affiliated corporation because, as the Tax Court found, the conveyance was in partial satisfaction of an indebtedness of petitioner to its affiliated corporation.

STATUTE AND RULES INVOLVED

Section 453 (a) and (b) of the Internal Revenue Code of 1954, and Rules 18 and 21 of the Local Rules of the United States Court of Appeals for the Fifth Circuit are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

In 1964, petitioner was indebted in the amount of at least $700,000.00 to an affiliated corporation, Great Southwest Life Insurance Company ("Great Southwest"), a Texas corporation engaged in the life insurance business. In October of that year, petitioner conveyed certain real property to Great Southwest. Petitioner's basis in the property was $414,613.02, and the agreed price of the property was $967,518, yielding a gain of $552,886.98 to petitioner. (Pet. App. B–2 to B–5, B–17 to B–19.)

For the agreed purchase price, Great Southwest took the property subject to a first lien securing a note of $374,213.95, and paid $2,128.50 of petitioner's

closing costs. With reference to the remaining $591,175.55, Great Southwest issued to petitioner a nonnegotiable written obligation in that amount, termed a "surplus bond." This was not a general obligation of Great Southwest, but by its terms was payable only from a sinking fund which, in turn, was to be established only if and when Great Southwest's surplus reached levels unlikely to be attained, and not subsequently attained. By the terms of the bond, however, Great Southwest had the right, at its option, to make payment of all or part of the principal and interest at any time from any funds. Because of the stated contingencies in the bond, it had little or no value as an obligation. (Pet. App. B–3 to B–5.)

On its income tax return for its fiscal year ending October 31, 1964, petitioner reported the sale of the property in question for $967,518, and stated its election to report the resulting gain on the installment method. During the years 1965 through 1968, petitioner made entries on its books reducing its indebtedness to Great Southwest, see *supra*, p. 2, in aggregate amounts of $591,175.55 principal and $99,149.32 interest, and treated these reductions in its indebtedness to Great Southwest as giving rise to payments of the purchase money obligation for the property conveyed in October, 1964. (Pet. App. B–5 to B–6.)

Upon audit of petitioner's income tax return for its fiscal year ending October 31, 1964, the Commissioner of Internal Revenue determined that the entire gain from the sale to Great Southwest should be included in income for that year, and asserted a

deficiency. The deficiency letter stated (Pet. App. B–7): "It is further determined that this gain is not reportable using the installment method of reporting." Petitioner filed a petition with the Tax Court seeking a redetermination of the deficiency. At the opening of the hearing in the Tax Court, counsel for the Commissioner stated alternative reasons why the transaction did not qualify for installment reporting. The parties then submitted a stipulation of facts, accompanied by joint exhibits. No other evidence was introduced. In his brief, counsel for the Commissioner stated that the Commissioner relied exclusively upon the position that petitioner must recognize the full gain in the year of transfer because the land was transferred in part payment of petitioner's indebtedness to its affiliate. The Tax Court sustained the Commissioner's determination on this ground. (Pet. App. B–1, B–6, B–12 to B–14.)

Petitioner appealed the decision of the Tax Court to the Court of Appeals for the Fifth Circuit. After the record had been filed and all briefs submitted, the court of appeals notified counsel for the parties that, pursuant to its Local Rule 18, the case was transferred to the summary calendar for disposition without argument. The court of appeals subsequently affirmed the decision of the Tax Court without opinion. (Pet. 7–8.)

ARGUMENT

The decision below, affirming the decision of the Tax Court, is substantively correct, and there was no procedural error. There is no conflict or reason for further review.

1. Under Section 453(b) of the Internal Revenue Code, Appendix, *infra*, pp. 6–7, gain from the sale of real property may be reported on the installment method only if in the year of sale payments do not exceed 30 percent of the selling price. Any outstanding indebtedness of the seller cancelled in consideration of the transfer of the property is properly deemed a payment in the year of sale. *Riss.* v. *Commissioner*, 368 F. 2d 965 (C.A. 10). The Tax Court found that petitioner's indebtedness to its affiliate had been cancelled in consideration of the transfer, and the stipulated facts were wholly consistent with that finding. Great Southwest in fact made no payments to petitioner. Petitioner simply entered on its own records from time to time a notation of a reduction of its own indebtedness to Great Southwest, and treated those notations as payments by Great Southwest. When cross-debts are intended to be offsetting, income may not be deferred by postponing the formality of making book entries. *Acer Realty Co.* v. *Commissioner*, 132 F. 2d 512 (C.A. 8).

The burden of proof in the Tax Court to demonstrate that it had fulfilled the requirements of Section 453 was upon petitioner. Rule 32, Rules of Practice, United States Tax Court (Rev. 1958, 1971 ed.). The stipulated facts permitted, if, indeed, they did not compel, the conclusion that taxpayer's indebtedness to Great Southwest was discharged to the extent of $591,175.55 upon the conveyance of the property, and that the timing of book entries thereafter was solely a matter of petitioner's choice. As this Court pointed

out in *Commissioner* v. *Scottish American Co.*, 323 U.S. 119, 123–124:

> The Tax Court has the primary function of finding the facts in tax disputes, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it considers most reasonable.

This case was submitted to the Tax Court solely upon stipulated facts and exhibits. There is no suggestion that the statements of counsel at the opening of the hearing in the Tax Court shaped or influenced the contents of the stipulation submitted. Where facts are agreed, the court properly should dispose of the case as those facts may require. *Commissioner* v. *Gordon*, 391 U.S. 83. There was therefore no substantive or procedural error in the Tax Court's decision of the case.

2. The court of appeals placed the petitioner's appeal upon its summary calendar for disposition without oral argument pursuant to its Local Rule 18, Appendix, *infra*, pp. 10–11. That Rule was adopted in an effort to lighten somewhat the burden of an extraordinarily heavy docket, and the court has several times fully explained its operation. *Murphy* v. *Houma Well Service*, 409 F. 2d 804 (C.A. 5); *Huth* v. *Southern Pacific Co.*, 417 F. 2d 526 (C.A. 5); *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of N.Y.*, 431 F. 2d 409 (C.A. 5). The case is placed on the summary calendar for disposition without oral argument only after submission of the record and all briefs to a panel of three active judges, and after all have agreed that oral argument would not be helpful. If any of the judges

has any doubts as to the proposed disposition, the case will be set for oral argument. The practice is therefore not equivalent to a discretionary petition for review, as petitioner has asserted. (Pet. 11.) This question has previously been presented to this Court. *Payton* v. *United States*, 425 F. 2d 1324 (C.A. 5), certiorari denied, 400 U.S. 957.

Indeed, this Court has on appropriate occasions disposed of cases on the merits after consideration of the briefs and records, and without oral argument. See, e.g., *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4. As this Court's practice and decisions indicate, there is no right to oral argument if a case is otherwise fully placed before a court for its consideration. *Communications Comm'n* v. *WJR*, 337 U.S. 265, 274. Full briefs were before the court of appeals in the present case, and the nature of the Tax Court's decision made the case wholly appropriate for disposition without oral argument, which could have added little to the content of the briefs.

Petitioner complains also that, in accordance with its Local Rule 21, Appendix, *infra*, p. 11, the court of appeals wrote no opinion. The operation of this Rule has also been fully explained by the court. *N.L.R.B.* v. *Amalgamated Cloth. Wkrs. of Amer., AFL–CIO, L. 990*, 430 F 2d 966 (C.A. 5). Affirmances without opinions are legion in the law reports, and there is no indication that this response to crowded dockets deprives litigants of full consideration of their cases, or is otherwise prejudicial. In this case, the Tax Court's decision, based upon stipulated facts and the

factual inferences to be drawn therefrom, called for no opinion by the court of appeals upon affirmance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 453. INSTALLMENT METHOD.

(a) [as amended by Sec. 3(a), Act of August 31, 1964, P.L. 88–539, 78 Stat. 746] *Dealers in Personal Property.*—

(1) *In general.*—Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(2) *Total contract price.*—For purposes of paragraph (1), the total contract price of all sales of personal property on the installment plan includes the amount of carrying charges or interest which is determined with respect to such sales and is added on the books of account of the seller to the established cash selling price of such property. This paragraph shall not apply with respect to sales of personal property under a revolving credit type plan or with respect to sales or other dispositions of property the income from which is, under subsection (b), returned on the basis and in the manner prescribed in paragraph (1).

(b) *Sales of Realty and Casual Sales of Personalty.*—

(1) *General rule.*—Income from—

(A) a sale or other disposition of real property, or

(B) a casual sale or other casual disposition of personal property (other than property of a

kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding $1,000;

may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

(2) *Limitation.*—Paragraph (1) shall apply—

(A) In the case of a sale or other disposition during a taxable year beginning after December 31, 1953 (whether or not such taxable year ends after the date of enactment of this title), only if in the taxable year of the sale or other disposition—

(i) there are no payments, or

(ii) the payments (exclusive of evidences of indebtedness of the purchaser) do not exceed 30 percent of the selling price.

(B) In the case of a sale or other disposition during a taxable year beginning before January 1, 1954, only if the income was (by reason of section 44(b) of the Internal Revenue Code of 1939) returnable on the basis and in the manner prescribed in section 44(a) of such code.

* * * * *

Local Rules of the United States Court of Appeals for the Fifth Circuit:

Rule 18
SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(2) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on

the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970 [431 F. 2d 409].

Rule 21

AFFIRMANCE WITHOUT OPINION

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such cases, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See *N.L.R.B.* v. *Amalgamated Clothing Workers of America*, 5th Cir. 1970 [430 F. 2d 966].

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